Supreme Court, U.S.
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NO. ____

IN THE

Supreme Court of The United States

OCTOBER TERM, 1995

TYLER MURRAY, by and through his parents and next friends, John and Myrna Murray,

Petitioner,

v.

MONTROSE COUNTY SCHOOL DISTRICT RE-1J, a school district of the State of Colorado,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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August 4, 1995

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QUESTIONS PRESENTED

1. Whether 20 U.S.C. § 1412(5)(B), which specifies the conditions for removal of children with disabilities from the "regular educational environment," and the regulations implementing that statute create a presumption in favor of neighborhood schooling for children with disabilities, as to which the courts of appeals are in conflict.

2. Whether 34 C.F.R. § 300.552, a regulation implementing 20 U.S.C. § 1412(5)(B), and administrative interpretations of this rule, both of which require reasonable accommodation of children with disabilities in regular classes at neighborhood schools, provide a permissible construction of the statute, and, if so, whether the decision below conflicts with decisions of this Court.

3. Whether the plain meaning of 20 U.S.C. § 1412(5)(B), as confirmed by its legislative history, requires consideration of supplementary aids and services as a reasonable accommodation for children with disabilities in their neighborhood schools.

4. Whether a 1983 amendment, 20 U.S.C. § 1407(b), ratified the extant regulations and interpretations of the U.S. Department of Education, requiring the reasonable accommodation of children with disabilities in their neighborhood schools through use of supplementary aids and services, and, if so, whether the decision below conflicts with decisions of this Court.

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TYLER MURRAY, by and through his parents and next friends, John and Myrna Murray,

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MONTROSE COUNTY SCHOOL DISTRICT RE-1J, a school district of the State of Colorado,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-25a) is reported at 51 F.3d 921. The opinions of the district court (App., *infra*, 26a-50a) are unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on April 4, 1995 (App., *infra*,

1a). The Court of Appeals denied a timely petition for rehearing on May 8, 1995 (App., *infra*, 116a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

(Reproduced in Appendix)

20 U.S.C. § 1412(5)(B)	-	App., *infra*, 117a
20 U.S.C. § 1407(b)	-	App., *infra*, 117a-118a
34 C.F.R. § 300.552	-	App., *infra*, 118a

STATEMENT OF THE CASE

A. Factual Background

This case arose under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 - 1485 ("IDEA"). Tyler Murray has cerebral palsy, which has caused physical and speech impairments and limitations upon his intellectual capacity. The Murrays live in Olathe, Colorado, where Tyler has friends and the Murrays know many families. Olathe maintains a K-12 school system as part of the Montrose County School District ("District"). Tyler attended Olathe Elementary School ("Olathe"). He lives approximately five blocks from Olathe, where his younger brother, Jed, attends school.

In 1988, the District developed an individualized education program ("IEP")[1] for Tyler. The IEP team placed Tyler at

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[1] "The IEP is in brief a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs." *School Comm. of*

Olathe. At an annual review of the IEP held in May, 1989, the IEP team recommended that Tyler stay at Olathe. A review staffing was held in January, 1990. Tyler had surgery in July, 1990, and was in a cast for six weeks, with serious complications. Children who have had this type of surgery commonly spend one to two months recuperating. Tyler regressed and had difficulty meeting the goals of his IEP during this time.

In August, 1990, the Murrays, the District's special education director, Mr. Binder, and others held a meeting. The District informed the Murrays that Tyler's IEP "could be implemented" at Northside Elementary School ("Northside") in Montrose, Colorado, approximately eleven miles from Tyler's home; that moving Tyler to Northside was not a change in placement; and that Northside was "a more appropriate place" for him.[2] The Murrays disagreed. The District later notified them that the regularly scheduled annual review had been changed to a triennial review to be held in November, 1990, following educational assessments of Tyler by the District.

At the triennial, some of Tyler's teachers expressed concern about his academic progress during that fall. Two placement alternatives were considered -- the mild-moderate needs program at Olathe and the severe-needs program at Northside. The IEP team could not reach consensus on the

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Burlington v. Department of Educ. of Massachusetts, 471 U.S. 359, 368 (1985) (citing 20 U.S.C. § 1401(19)).

[2] Petitioner's Appendix in the Tenth Circuit at 35, l. 22 to 36, l.6. That appendix hereinafter will be cited as "C.A. App. ___."

appropriate school for Tyler. Northside involved a lengthy bus ride, and Tyler would be away from his friends and brother. The change could have caused stress for Tyler, necessitating adjustment. Some team members were concerned Tyler might have difficulty forming meaningful friendships in a school away from his community.

The team developed a new IEP that increased Tyler's time in the resource room. On December 13, 1990, Mr. Binder sent the Murrays a letter stating that Tyler was being moved to Northside, effective January 7, 1991. On January 7, the Murrays requested a due process hearing, notified the District that the November IEP was incomplete, and requested an independent evaluation.[3]

The District reconvened the IEP team on March 18, 1991. At this IEP meeting, several of Tyler's teachers stated that he was making progress not reflected in the November, 1990 triennial.[4] Some of the teachers characterized Tyler's progress as a "growth spurt." Members of the IEP team confirmed that Tyler was learning and receiving successful academic services at Olathe.[5] Tyler also had made physical progress from September, 1990, and especially since

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[3] The District granted the request and recommended an evaluator. There were no significant differences in the scores of tests administered to Tyler by the evaluator and the District.

[4] C.A. App. 197, l. 8-12; C.A. App. 172, l. 17-23; C.A. App. 301, l. 17 to 302, l. 11; C.A. App. 341, l. 18 to 342, l. 6; C.A. App. 458, l. 1-17; C.A. App. 632, l. 6-13; C.A. App. 173, l. 16 to 174, l. 11; C.A. App. 281, l. 2 to 282, l. 4.

[5] C.A. App. 279, l. 23 to 280, l. 4; C.A. App. 282, l. 2-5.

November, 1990.[6] This progress may well have reflected his recovery from his surgery.[7] Despite this new information, no one who participated in the November triennial changed his or her position at the March meeting.

At the due process hearing, Dr. Jeffrey Strully, one of Petitioner's experts, identified six reasons neighborhood schools are important for children with disabilities. First, these children need to be present in their communities in natural proportions to learn to live in society and decrease stigma. Second, parental communication and involvement increase at the neighborhood school.

Third, neighborhood schools foster friendships for children with disabilities, enhance self-esteem, and minimize the problem of abuse. In Dr. Strully's view, "[w]hen kids are removed, especially when kids are bused out of their neighborhood, what we see over and over again is kids being strangers in their own community."[8] Further, stronger ties to peers and community motivate children with disabilities to learn more successfully.

Fourth, when children with disabilities are in their neighborhood schools, they learn from their immediate environment rather than having to transfer concepts learned elsewhere. Fifth, the neighborhood school strengthens family

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[6] C.A. App. 629, l. 17 to 630, l. 6; C.A. App. 631, l. 10-21; C.A. App. 632, l. 1-5.

[7] C.A. App. 629, l. 17 to 630, l. 6.

[8] C.A. App. 547, l. 18-21.

ties by making it less likely families will view their disabled and nondisabled children as leading separate, different lives.

Sixth, siblings of children with disabilities report to their parents about how children with disabilities are functioning at school, and these siblings can help prevent problems from developing for children with disabilities.

Dr. Strully testified that "supports" helped keep children in neighborhood schools. Certain natural supports, such as nondisabled, age-appropriate peers, exist at the neighborhood school. He testified about providing supports[9] on an itinerant basis to teachers at schools such as Olathe rather than providing services to all children with comparable needs at one location. Dr. Strully also testified about itinerant assistance as an effective tool to support the regular education teachers in the neighborhood school. Itinerant professionals and paraprofessionals "can float from one school to another."[10] If administrative convenience were controlling, services for people with disabilities would be centralized because "that's where we have everything."[11] Dr. Strully testified that "removal is a decision that's supposedly made after the use of supplementary aids and services [has] been

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[9] He testified that the concept of supports includes the adaptation of curriculum, itinerant specialists, and paraprofessionals or aides. These are supplementary aids or services under 20 U.S.C. § 1412(5)(B). *See, e.g., Oberti ex rel. Oberti v. Board of Educ.*, 995 F.2d 1204, 1216 (3d. Cir. 1993); 34 C.F.R. § 300.551(b)(2).

[10] C.A. App. 584, l. 9-17.

[11] C.A. App. 584, l. 10-24.

tried and that no removal is allowed technically until that has been thought about."[12]

Mr. Binder testified that Northside would be the least restrictive environment for Tyler because a great portion of his day would be spent with nondisabled children. Mr. Binder felt that the Northside staff was better trained to work with severe needs children and to provide for their needs in a regular classroom setting. He also testified that he would consider the home school "only if the program is available there, and only if that program is appropriate."[13]

The "severe needs" teacher at Northside felt that Northside's severe-profound needs program could do a better job than could be done at Olathe of integrating Tyler into regular education and that Northside had a better student-teacher ratio in the special education program. Because she had never worked with Tyler, she did not know how much time he would have to be taken out of the regular classroom at Northside compared to Olathe. Nevertheless, the District had estimated that at Olathe, Tyler would require 120 to 180 minutes outside of the regular classroom each day, and at Northside, he would require 60 to 120 minutes outside of the regular classroom each day.[14] She believed that Olathe did

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[12] C.A. App. 561, l. 2-5. *See also* C.A. App. 559, l. 9-13.

[13] C.A. App. 114, l. 10-12.

[14] The District did not consider the full range of supplementary aids and services (or accommodations) at Olathe. Consequently, there was no projection of the amount of time Tyler would have to be pulled out of the regular classroom after appropriate supplementary aids and services had been deployed from the full range of such aids and services.

not have enough paraprofessionals to be able to help the teachers, but that Northside had additional staffing.

The Olathe principal testified that Northside was better able to serve Tyler because of the collaborative effort of the Northside staff and the training they had received.[15] In her opinion, the Olathe teachers did not have the release time to collaborate. The resource teachers at Olathe spent their time on moderate needs children and did not have time outside of their teaching day to collaborate, as could be done at other schools. Petitioner's counsel asked, "Why can't your program at Olathe be more collaborative?"[16] She replied, "The issue right now in looking at Olathe . . . is training, that that training has not been provided to our staff."[17]

Petitioner's counsel asked an Olathe special educator, "Is there a way that the expertise of Northside can be brought over to assist in providing that expertise at Olathe?"[18] She replied, "Currently . . . we would not be able to meet that."[19]

In the district court, Plaintiff designated Drs. Jill England and Mara Sapon-Shevin as expert witnesses. Dr. England found that Tyler was receiving an appropriate education at

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[15] Collaboration refers to a team of regular and special education teachers working together. C.A. App. 401, l. 10-15.

[16] C.A. App. 400, l. 7-8.

[17] C.A. App. 400, l. 9-12.

[18] C.A. App. 208, l. 11-13.

[19] C.A. App. 208, l. 14-16.

Olathe and making academic and social progress. Dr. Sapon-Shevin concluded that Tyler was making educational progress and receiving educational benefit from the program at Olathe, which was an appropriate one for him. She suggested modifications that could be made by the District at minimal cost that could improve Tyler's educational opportunities and potential for success, including peer support, cooperative learning, adaptive instruction, and teacher consultation. Dr. Sapon-Shevin was concerned that at Northside, the "congregation of many children with 'severe/profound needs'" would result in "overrepresentation of children with disabilities . . . [that] typically results in increased stigma and 'surplus visibility.'"[20]

B. Proceedings Below

Pursuant to 20 U.S.C. § 1415(b), Petitioner, on January 7, 1991, requested a due process hearing, which was held on March 25, 26, and 27, 1991. Petitioner's counsel asserted in his closing argument at that hearing that Tyler should stay at Olathe in view of the testimony about his significant academic and physical progress and that Tyler's program could be reviewed if he did not continue to make progress there. Petitioner also argued that the District had not adequately explored how to "maintain [the] neighborhood placement" and provide "adequate support."[21] The Hearing Officer concluded in his decision that Tyler was receiving an appropriate education at Olathe where he should remain and could participate in a "regular educational environment."

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[20] C.A. App. 1272.

[21] C.A. App. 668, l. 17 to 669, l. 2.

On May 9, 1991, the District appealed the Hearing Officer's decision to an Administrative Law Judge ("ALJ") pursuant to 20 U.S.C. § 1415(c).[22] The ALJ reversed the Hearing Officer's decision[23] on September 9, 1991. He concluded that Olathe did not constitute an appropriate placement, the District could not be required to incur the expense of duplicating Northside's "severe/profound needs program" at Olathe, and that Northside was the "least restrictive placement" for Tyler (App., *infra*, 92a-93a).

On September 17, 1991, Petitioner filed an action in the district court. The jurisdiction of that court was invoked under 20 U.S.C. § 1415(e)(2) and 28 U.S.C. § 1331. On October 21, 1993, the district court "affirmed" the ALJ's decision and dismissed the action (App., *infra*, 40a). Approximately one month after the dismissal, another triennial review was held and the resulting IEP permitted Tyler to remain at Olathe for the 1994-95 school year.

Petitioner filed his Notice of Appeal on November 19, 1993. On April 4, 1995, the Tenth Circuit affirmed the decision of the district court, concluding that there was no

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[22] The District requested to submit additional evidence to the ALJ. This evidence projected the cost of establishing a "severe/profound needs program" at Olathe. Petitioner objected to the request to submit the affidavit as irrelevant because the Hearing Officer had not ordered the District to duplicate the Northside "severe needs" program at Olathe. Petitioner has never requested such duplication.

[23] The Hearing Officer's decision was not transmitted by the ALJ to the district court as part of the administrative record. It is included in the Appendix to this Petition pursuant to SUP. CT. R. 14.1(k)(ii).

presumption of neighborhood schooling under the IDEA and that school districts were not obligated to explore supplementary aids and services before removing children from their neighborhood schools (App., *infra*, 21a).[24]

On April 18, 1995, Petitioner filed a Petition for Rehearing with a Suggestion for Rehearing in Banc. The Petition was denied on May 8, 1995 (App., *infra*, 115a-116a).

REASONS FOR GRANTING THE PETITION

The decision below is part of a conflict in the circuits over the proper interpretation of 20 U.S.C. § 1412(5)(B). This statute is the "least restrictive environment" provision of the IDEA and has never been comprehensively addressed by this Court. This case evidences the need for the Court's guidance.

The decision below is erroneous. It is in conflict with the longstanding policy and interpretation of the IDEA by the U.S. Department of Education ("DOE"). It departs from the plain meaning of the statute, as confirmed by its legislative history. The decision also conflicts with an authoritative re-

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[24] The Tenth Circuit concluded that the November, 1993 IEP had rendered moot the need for the presentation of "additional evidence" pursuant to 20 U.S.C. § 1415(e)(2). The court and the parties, however, agreed that the issue of whether supplementary aids and services must be utilized to support neighborhood schooling was not moot. Although the court apparently found that Petitioner had exhausted his administrative remedies as to whether the District was required to consider the full range of supplementary aids and services before removing Tyler from Olathe, it also found that Petitioner had not exhausted as to the presentation of additional evidence under § 1415(e)(2) concerning specific aids and services. *Compare* App., *infra*, 21a *with* App., *infra*, 22a n.14.

enactment and amendment to the IDEA. The decision also conflicts on different points with *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), *Thomas Jefferson Univ. v. Shalala*, 114 S. Ct. 2381 (1994), and this Court's guidance on the weight to be given legislative re-enactments and amendments. The decision below threatens to deprive children with disabilities of any accommodation to support a neighborhood school placement. Thus, it will deprive the parents of such children of any voice in whether their children will be accommodated at those schools.

I. The Decision Below Is Part of a Conflict in the Circuits

The Tenth Circuit's decision states that "[t]o the extent the Third Circuit has expressly held . . . that the IDEA encompasses a presumption of neighborhood schooling, we disagree." App., *infra*, 19a. On this point, the Tenth Circuit and the Third Circuit in *Oberti ex rel. Oberti v. Board of Educ.*, 995 F.2d 1204 (3d Cir. 1993), give opposite constructions to 34 C.F.R. § 300.552. *Oberti* read this section to create "a presumption in favor of placing the child, if possible, in the neighborhood school . . . ." 995 F.2d at 1224 n.31. The decision below suggests removal from the neighborhood school was a secondary issue in *Oberti* and noted that the holding there was qualified by only requiring neighborhood schooling "'*if possible.*'" App., *infra*, 19a n.13 (quoting *Oberti*, 995 F.2d at 1224 n.31) (emphasis by the Tenth Circuit). Neither point diminishes the irreducible conflict between these decisions on the role of neighborhood schooling in analysis of the least restrictive environment.

Behind the square conflict between the decision below and *Oberti* lies a deeper inconsistency in the approach of various courts to interpretation of § 1412(5)(B). Decisions of the First, Fourth, Eighth, Ninth and, now, Tenth Circuits have characterized the statute as exclusively concerned with classroom integration or "mainstreaming."[25] In three of these cases, including the decision below, the courts have also treated neighborhood or community schooling as a relatively minor issue arising under the regulations and having little, if anything, to do with § 1412(5)(B).[26] In contrast, the Third, Fifth and District of Columbia Circuits, as well as district courts in the Second and Seventh Circuits, have treated the relation of schooling to neighborhood or community as a part of the least restrictive environment under the statute.[27] Although the decisions implicated in

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[25] *See Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992-93 (1st Cir. 1990), *cert. denied*, 499 U.S. 912 (1991); *Barnett ex rel. Barnett v. Fairfax County Sch. Bd.*, 927 F.2d 146, 150, 153 (4th Cir.), *cert. denied*, 502 U.S. 859 (1991); *Schuldt ex rel. Schuldt v. Mankato Sch. Dist. No. 77*, 937 F.2d 1357, 1361 (8th Cir. 1991) (school district is "already providing [the child] with a fully integrated public education, thereby meeting its obligations under the [IDEA]"), *cert. denied*, 502 U.S. 1059 (1992); *Wilson v. Marana Unified Sch. Dist.*, 735 F.2d 1178, 1183 (9th Cir. 1984).

[26] *See Schuldt*, 937 F.2d at 1361; *Barnett*, 927 F.2d at 150 (state must place child in least restrictive environment pursuant to 34 C.F.R. § 300.552; "[t]he Act, however, requires [mainstreaming] . . . .").

[27] *Oberti*, 995 F.2d at 1224 n.31; *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127, 128, 132 (5th Cir. 1993); *Sherri A.D. v. Kirby*, 975 F.2d 193, 206 (5th Cir. 1992) ("Even in cases in which mainstreaming is not a feasible alternative, there is a statutory preference for serving

this broader conflict can be distinguished, the role of neighborhood or community in analysis of the least restrictive environment is unpredictable and disputable, circuit to circuit.

Beyond the courts, of course, innumerable IEP teams and administrative tribunals face this issue each school year.[28] Thus, the inconsistency among the circuits presents a significant problem in administration of the IDEA.

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disabled individuals in the setting which is least restrictive of their liberty and which is near the community in which their families live") (citing *School Comm. of Burlington v. Department of Educ. of Massachusetts*, 471 U.S. 359, 373 (1985), and *Kerkam v. Superintendent, D.C. Pub. Sch.*, 931 F.2d 84, 87 (D.C. Cir. 1991)); *Kerkam*, 931 F.2d at 87 (residential placement far from home is more restrictive than a local extended-day program "in light of the statutory preference for the least restrictive educational environment appropriate to the needs of the child, 20 U.S.C. § 1412(5)(B) . . ."); *Mavis v. Sobol*, 839 F. Supp. 968, 990 (N.D.N.Y. 1994) (characterizing removal from the neighborhood school and school district in *Oberti* as more "egregious" than mere failure to mainstream); *Tarah P. v. Board of Educ.*, No. 94 C 3896, 1995 WL 66283 at *3, 22 Individuals with Disabilities Educ. L. Rep. (LRP Publications) 246, 248 (N.D. Ill. Feb. 15, 1995) ("presumption in favor of the neighborhood school clearly exists," but is "tempered by feasibility and the individual needs of a disabled child").

[28] *See, e.g.*, *Delton-Kellogg Sch.*, 20 Individuals with Disabilities Educ. L. Rep. (LRP Publications) 291, 294 (Mich. Hearing Officer's Decision May 14, 1993) ("Petitioner has not overcome the presumption that a handicapped child should be placed in his/her home school"), *aff'd sub nom. In re Child with Disabilities*, 20 Individuals with Disabilities Educ. L. Rep. (LRP Publications) 218 (Mich. SEA June 25, 1993).

II. The Decision Below Is Erroneous

A. The Tenth Circuit's Decision Conflicts with the Regulations and Administrative Interpretations of the Statute

Regulations to implement the IDEA were proposed in 1976 and came into force in 1977.[29] The regulators were given the sensitive task of intervening in an area of traditional state prerogatives to correct pervasive abuses found by Congress. The regulations require that a child with a disability be "educated in the school that he or she would attend if nondisabled," unless the IEP "requires some other arrangement."[30] Of course, proper development of an IEP involves consideration of the supplementary aids and services that may be used to support the child's education. *See, e.g., Greer ex rel. Greer v. Rome City Sch. Dist.*, 950 F.2d 688, 696 (11th Cir. 1991), *withdrawn*, 956 F.2d 1025, *reinstated*, 967 F.2d 470 (1992) (consideration of whether education can be achieved satisfactorily "with supplemental aids and services must occur *prior to and during* the development of the IEP") (emphasis in original). Thus, the regulations require such consideration before a child is removed from the school he or she would attend if not disabled.

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[29] *See* Education of Handicapped Children: Implementation of Part B of the Education of the Handicapped Act, 42 Fed. Reg. 42,474 (1977) (originally codified at 45 C.F.R. pts. 100b, 121a, and 121m; redesignated 34 C.F.R. pt. 76, 34 C.F.R. pt. 300, 34 C.F.R. pt. 301 in Transfer and Redesignation of ED Regulations, 45 Fed. Reg. 77,368 (1980)).

[30] 34 C.F.R. § 300.552(c).

Additionally, these rules have long been interpreted to require use of supplementary aids and services for reasonable accommodation of children at neighborhood schools. Beginning in 1978, the regulators held use of supplementary aids and services was required to support education in a "local school."[31] In 1980, the regulators stated: "[U]nless a handicapped child's program requires some other arrangement, the handicapped child is educated in the school he/she would attend if not handicapped, *and any necessary ancillary aids or services must be provided on that campus* . . . ."[32]

Recently, the regulators stated that "the regular classroom in the neighborhood school should be the first placement *option* . . . [and] our education system must provide . . . training and support . . . to make the regular classroom in the neighborhood school the appropriate placement . . . ."[33]

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[31] *Frith*, 1978-87 Educ. Handicapped L. Rep. (LRP Publications) 211:84, 85 (Bureau of Educ. for the Handicapped Dec. 26, 1978) (App., *infra*, 121a).

[32] *Levy*, 1978-87 Educ. Handicapped L. Rep. (LRP Publications) 211:249, 249 (Office of Special Education Oct. 8, 1980) (App., *infra*, 124a). *Levy* supported its position with citation to an article by Dr. Jerry Vlasak, then Chief of the Administrative Review Section of the Bureau for Education of the Handicapped. Dr. Vlasak asserted that additions or revisions to programs were required to accommodate children with disabilities at neighborhood schools. Jerry W. Vlasak, *Mainstreaming Handicapped Children: The Underlying Legal Concept*, J. OF SCH. HEALTH 285, 286 (May, 1980).

[33] *Spratt*, 20 Individuals with Disabilities Educ. L. Rep. (LRP Publications) 1457, 1458 (Office of Special Educ. and Rehab. Services Jan. 12, 1994) (emphasis in original) (App. *infra*, 128a). Conversely, if "a child could not, even with the required provision of supplementary

Most recently, a memorandum of guidance to the states explained: "If the IEP of a student with a disability can be implemented satisfactorily with the provision of supplementary aids and services in the regular classroom *in the school the student would attend if not disabled*, that placement is the LRE placement for that student."[34]

The decision below is in error because it conflicts with the obvious meaning of the regulations and their interpretations over a course of 16 years.

B. The Tenth Circuit's Decision Is Contrary to the Plain Meaning of the Statute and Its Legislative History

1. The Decision Below Has No Basis in the Text of 20 U.S.C. § 1412(5)(B)

The Tenth Circuit's decision states that § 1412(5)(B) "simply says nothing, expressly or by implication, about removal of disabled children from neighborhood schools." App., *infra*, 18a. According to the decision, therefore, there is no "presumption" of neighborhood schooling. The decision below holds, however, there is a "preference" for neighborhood schooling of children with disabilities. *Id.*,

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aids and services, achieve some educational benefit from placement in his or her home school, then placement elsewhere is appropriate." *Fern Ridge Sch. Dist. 28J*, 16 Educ. Handicapped L. Rep. (LRP Publications) 676, 681 (Or. Hearing Officer's Decision Mar. 19, 1990).

[34] *OSEP Memorandum 95-9*, 21 Individuals with Disabilities Educ. L. Rep. (LRP Publications) 1152, 1154 (Nov. 23, 1994) (emphasis added) (App, *infra*, 133a). In the memorandum, "LRE" is an abbreviation for least restrictive environment.

infra, 19a. This is an impossible reading of the statutory text. If § 1412(5)(B) says "nothing" about removal from neighborhood schools, there could not be a "preference" any more than there could be a "presumption."

Paradoxically, under the decision below, the rule that governs a student being removed from an integrated class includes consideration of supplementary aids and services to accommodate the child in that class. On the other hand, the rule that governs a student being taken from a neighborhood school does not require consideration of such aids and services to accommodate the child in that school. Certainly, Congress could have passed a statute with two rules, one governing integrated classes and the other governing neighborhood schooling. It did not. Section 1412(5)(B) contains only one rule, which requires accommodation in all aspects of the "regular educational environment." That rule allows more restrictive placements when, "with the use of supplementary aids and services," education in regular classes "cannot be achieved satisfactorily." Either that rule applies to neighborhood schools, or no test applies. As we will demonstrate below, this rule plainly applies to neighborhood schooling. In any event, a notion of two separate rules (one for neighborhood schooling and another for classroom integration) has no anchor in the words of the statute. The decision below cannot be reconciled with the statutory text.

2. Neighborhood Schooling Is Within the Text of § 1412(5)(B)

The Tenth Circuit holds that neighborhood schooling is "at most" a preference. App. *infra*, 19a. Perhaps this reserves the possibility that neighborhood schooling is not a part of the least restrictive environment. If so, this sharpens the

conflict with other courts, the regulators, and, as discussed below, the 1983 amendment. It also leaves the Tenth Circuit's decision in conflict with the statutory text.

The statute has two distinct clauses, which should not be confused. The first clause promotes integration. That is, it requires an effort to educate children with disabilities together with nondisabled children in all cases: "[T]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, [are to be] educated with children who are not disabled . . . ." 20 U.S.C. § 1412(5)(B).

The second clause is concerned with any removal from normal educational settings. This clause restricts removal from all aspects of regular education. That restriction, however, is not absolute: "[S]pecial classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only" when a statutory test is met. *Id.* The test is whether "the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." *Id.* Thus, only when this test is met can the child be "removed" from the regular educational environment, including the neighborhood school.

The IDEA was passed to "assure that the rights of children with disabilities and their parents or guardians are protected . . . ." 20 U.S.C. § 1400(c). From the point of view of children with disabilities and their parents, it is unmistakable that the "regular educational environment" includes the neighborhood school. Further, "removal" from that environment is defined by § 1412(5)(B) to include "special classes, separate schooling, or other removal." "[S]eparate school-

ing" is a verb and does not merely refer to "separate schools." Tyler faces separate schooling at Northside in the obvious sense of school*ing* separated from his friends, brother, and community. This is obviously a "removal" within the meaning of the statute as well. Yet, the decision below holds that school districts are only required to use supplementary aids and services to integrate classes regardless of where those classes are located.

Finally, this section of the statute does not exist in a vacuum. A separate statute passed the same year, 20 U.S.C. § 1701(a)(2), declared "the neighborhood" to be the "appropriate basis for determining public school assignments." This statute and § 1412(5)(B) should be read together. Such coordinate reading is appropriate with two education statutes, both passed in 1974, and both expressly addressed to securing the equal protection of the laws for students.[35] Section 1412(5)(B) plainly reaches neighborhood schooling.

3. The Plain Meaning of the Statute Is Confirmed by Its Legislative History

The legislative history of § 1412(5)(B) and the IDEA confirms that neighborhood schooling is part of the analysis of the least restrictive environment. As the legislative history merely serves to confirm the plain meaning of the statute, it is enough that what is now § 1412(5)(B) was discussed repeatedly as a provision for keeping children with

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[35] *See Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 739 (1989) (Scalia, J., concurring in part and concurring in the judgment).

disabilities in their neighborhood or community schools, if they could be so accommodated.[36]

The decision below is in error as it conflicts with the plain meaning of § 1412(5)(B), as confirmed by legislative history.

C. The Tenth Circuit's Decision Conflicts with a 1983 Amendment to the IDEA

1. The 1982 Regulatory Proposal

In 1982, DOE proposed amending the IDEA regulations to eliminate, *inter alia*, all reference to the location at which a child was to be educated.[37] A firestorm of controversy ensued. The overwhelmingly negative response is well represented in a comment by Senator Weicker:

> You know, I could not help but find some irony . . . that the very same philosophers in this administration that want to delete the current requirement that a disabled child should attend the school closest to his or her home wherever possible are the same philosophers who want to make sure that every normal child should attend the school closest to his or her home wherever possible. . . . Apparently, [children with disabilities] are the ones

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[36] *See, e.g., Education for All Handicapped Children, 1973-74: Hearings on S.6 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare*, 93rd Cong., 1st Sess. 25-27, 65, 102-05, 342, 360-62, 366, 374, 644-45, 789-96 (1973).

[37] *See* Assistance to States for Education of Handicapped Children, 47 Fed. Reg. 33,836, 33,842 (1982) (now codified at 34 C.F.R. pt. 300).

> that can go ahead and travel, and those that can walk are the ones that have to be next to home.[38]

Senator Dan Quayle expressed concern that removing the requirement that a child with a disability attend the school closest to home would have a detrimental effect on families.[39] Senator Quentin Burdick argued that the regulatory requirements should be retained for the sake of good education and because they "conform . . . with the law."[40]

2. The 1983 Amendment to the IDEA

In 1982, proposals to block the proposed regulations proceeded in Congress.[41] A House report on a legislative veto stated, *inter alia*: "[I]f a child need not be educated in a setting close to his home, school districts may choose to transport a handicapped child a long distance rather than *develop a program at the neighborhood school.*"[42] The

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[38] *Oversight on Education for All Handicapped Children Act, 1982: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources*, 97th Cong. 76 (1982).

[39] *Id.* at 29-31.

[40] *Id.* at 165-66.

[41] *See, e.g.*, 128 CONG. REC. 26,405 (1982) (House resolution reported to the floor); 128 CONG. REC. 20,063 (1982) (Senate Resolution passes 93-4).

[42] HOUSE COMM. ON EDUCATION AND LABOR, REGULATIONS CONCERNING THE EDUCATION OF THE HANDICAPPED ACT, H.R. REP. NO. 906, 97th Cong., 2d Sess. 4 (1982) (emphasis added).

proposed rules were put on hold.[43] An anticipatory legislative veto was introduced again in 1983.[44] Then, this Court held legislative vetoes unconstitutional. *INS v. Chadha*, 462 U.S. 919 (1983). An amendment to the IDEA was introduced. The House committee explained that it "remains strongly opposed to any attempts to alter the current regulatory requirements . . . ."[45] The amendment reads:

> The Secretary may not implement . . . any regulation . . . which would procedurally or substantively lessen the protections provided to children with disabilities . . . as embodied in regulations in effect on July 20, 1983 (particularly as such protections relate to . . . least restrictive environment[]] . . . .

20 U.S.C. § 1407(b). Petitioner has consistently argued that this ratified the existing regulatory environment, which included the existing interpretations of the rules.

The Tenth Circuit's decision is in error because it fails to give any effect to 20 U.S.C. § 1407(b).

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[43] Assistance to States for Education of Handicapped Children, 47 Fed. Reg. 49,871, 49,872 (1982) (now codified at 34 C.F.R. pt. 300).

[44] 129 CONG. REC. 1,493 (1983).

[45] H.R. REP. NO. 410, 98th Cong., 1st Sess., pt. A, at 21 (1983), *reprinted in* 1983 U.S.C.C.A.N. 2108.

III. The Decision Below Is in Conflict with Decisions of This Court

A. The Tenth Circuit Failed to Follow This Court's Decisions in *Chevron* and *Thomas Jefferson Univ. v. Shalala*

The regulations implementing § 1412(5)(B) and DOE interpretations require education of children with disabilities as close to home as possible and in the school they would attend if not disabled, unless a proper IEP requires otherwise. They also require consideration, during the IEP process, of supplementary aids and services that may be used to accommodate the child in the neighborhood school.[46]

Again, according to the decision below, § 1412(5)(B) "simply says nothing . . . about removal of disabled children from neighborhood schools." App., *infra*, 18a. Nevertheless, the Tenth Circuit found a "preference for education" in such schools. *Id.*, *infra* at 19a. The ultimate source of authority for this "preference" must be the statute.[47] The

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[46] The regulations were promulgated pursuant to an express delegation of authority. *See* 20 U.S.C. § 1417(b). Section 1417(b) forbade any "less formal method" for the *initial* implementation of the Act. *See Metropolitan Sch. Dist. v. Davila*, 969 F.2d 485, 494 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1360 (1993). This does not deprive the regulators of the ability subsequently to interpret their own regulations. *Id.* DOE retains that power as part of its "delegated lawmaking powers." *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 151 (1991) (citation omitted).

[47] It is unclear whether the Tenth Circuit expressly found the statute to be ambiguous. The court stated that certain legislative statements relied upon by Petitioner presented the same problem "as the

only explanation for this preference is that § 1412(5)(B) was viewed as "silent or ambiguous with respect to the specific issue." *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984). In that case, rather than "impose its own construction on the statute," the court should have determined "whether the agency's answer is based on a permissible construction of the statute." *Id.* The Tenth Circuit, however, did not address whether the regulations and DOE interpretations constituted "permissible construction[s] of the statute." *Id.* Certainly, if § 1412(5)(B) supports a "preference" for neighborhood schooling, it was permissible for the regulators to require that supplementary aids and services be used to accommodate education of children with disabilities at their neighborhood schools. Finding a preference while disregarding the regulators' approach conflicts with *Chevron*.

As part of the same principle, the regulators' interpretation of their own regulation "must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Thomas Jefferson Univ. v. Shalala*, 114 S. Ct. 2381, 2386 (1994) (citation omitted).

The decision below conflicts with decisions of this Court by giving insufficient weight to the regulations and regulatory interpretations, both of which are clearly permissible constructions of the statute's words.

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statute: they simply do not *clearly indicate* that Congress . . . meant anything more than avoiding as much as possible the segregation of disabled children from nondisabled children." App., *infra*, 20a (emphasis added).

B. The Tenth Circuit's Decision Is in Conflict with This Court's Decisions on the Weight to be Given Legislative Re-enactments or Amendments

The decision below is inconsistent with a long-established and clear principle of statutory construction stated by this Court: "Where, as here, 'Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation,' we cannot but deem that construction virtually conclusive." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381-82 (1969)). "When a Congress that re-enacts a statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation, and this Court is bound thereby." *United States v. Board of Comm'rs of Sheffield*, 435 U.S. 110, 134 (1978) (citations omitted).[48]

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[48] *Accord Heckler v. Turner*, 470 U.S. 184, 211 (1985) (amendment "leaves no doubt" of statute's meaning); *Stockdale v. The Insurance Companies*, 87 U.S. (20 Wall.) 323, 331 (1873) ("Both in principle and authority it may be taken to be established, that a legislative body may by statute declare the construction of previous statutes so as to bind the courts . . ."); *Alexander v. Alexandria*, 9 U.S. (5 Cranch) 1, 8 (1809) ("if a subsequent act on the same subject affords complete demonstration of the legislative sense of its own language . . . the subsequent should be incorporated into the foregoing . . ."). Notably, Chief Justice Marshall's opinion in *Alexander* announced the origin of the re-enactment rule as one instance of a broader rule that statutes on like subjects were to be harmonized. *Id.* at 7-8. *See also* case cited *supra* note 35 and accompanying text.

Here, the amendment rejected the proposed changes in the regulations and embraced the existing regulatory scheme. If one places weight on legislative history, the 1982 House Report shows that this enactment requires reasonable accommodation of children with disabilities at their neighborhood schools. (*See supra* note 42 and accompanying text.) If, in contrast, one focuses on the objective state of the regulations protected by § 1407(b), the interpretive rulings in *Levy* and *Frith* are decisive. (*See supra* notes 31 & 32.) Under either approach, the result is conclusive. "[T]he 'slumbering army' of Congress was . . . 'aroused,'" *Board of Comm'rs of Sheffield*, 435 U.S. at 135, and its passage of § 1407(b) was improperly discounted by the decision below. Indeed, the Congressional intervention in regulation through § 1407(b) is a stronger case for deference to preceding administrative rulings than the circumstances underlying many of this Court's decisions construing amendments and re-enactments.

Petitioner placed great weight on § 1407(b) below, only to have this Act of Congress virtually disregarded. The Tenth Circuit's decision improperly discounts § 1407(b), bringing it into conflict with directives of this Court on the weight to be given Congressional approval of regulations.

IV. The Questions Presented Are Important

The conflict in the circuits, errors in the decision below, and conflicts with decisions of this Court present important issues of federal statutory law. The Tenth Circuit's decision allows children with disabilities to be removed from their neighborhood schools without accommodation, contrary to the basic design of statutory efforts to eliminate disability discrimination by accommodating persons with disabilities in normal settings. *See, e.g.*, 42 U.S.C. § 12182.

The decision below threatens to deprive parents of any meaningful voice in the basic decision on which school their child will attend.[49] Further, exposing children with disabilities to neighborhood surroundings and classroom integration is important to developing the ability to work and live in society as an adult.[50] With accommodation, many children

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[49] Petitioner's focus on the concerns of parents does not suggest that the Tenth Circuit's decision is an unqualified blessing for school administrators. It puts them in a quandary over whether to honor the regulators' approach to neighborhood schooling. Those who choose to follow the decision below put their districts at risk of administrative sanctions for failure to follow the regulations and their established interpretation. *See Metropolitan Sch. Dist. v. Davila*, 969 F.2d at 489. Those who follow the regulators may believe the law requires this, yet find the Tenth Circuit's decision cited against them by those seeking more restrictive placements.

[50] The evidence in the record from Petitioner's experts is well-supported in the academic literature. *See, e.g., Winners All: A Call for Inclusive Schools*, REPORT OF THE NAT'L ASS'N OF STATE BDS. OF EDUC. STUDY GROUP ON SPECIAL EDUC. 12 (Oct. 1992). In addition, the National Council on Disability recently issued a comprehensive report entitled *Improving the Implementation of the Individuals with Disabilities Education Act: Making Schools Work for All of America's Children* (May 9, 1995). It contains a *Synthesis of Reports from Nationally Preeminent Special Education Researchers and Teacher Trainers* that summarizes 27 scholarly research papers commissioned by the National Council on Disability. *Id.* at 215. To serve students and families appropriately, this synthesis recommends the "education of the student in the most typical settings -- neighborhood schools -- so that all school environments are integrated by the presence of students with and without disabilities . . . ." *Id.* at 225. The Council itself found "[c]ontinuing noncompliance with the least restrictive environment provisions of [the] IDEA . . . ." *Id.* at 96. The Council found it particularly troubling that "most public schools continue to segregate large numbers of students with

can gain these important aspects of education while also making progress.

By denying a duty to accommodate, the decision below drives a wedge between two aspects of the least restrictive environment -- classroom mainstreaming and neighborhood schooling. As a result, parents will face a Hobson's choice. They may have to sacrifice neighborhood schooling to gain greater classroom integration. Additionally, if they question the program at a neighborhood school, this may cause their child to be bused from their community with no inquiry into improving the program. In relation to both integration and program content, the Tenth Circuit's decision does not require any effort at reasonable accommodation through use of supplementary aids and services at the neighborhood school. Thus, parents stand to risk classroom integration or program input or both to maintain neighborhood schooling. Alternatively, parents may be required to accept the busing of their child away from siblings, friends, and neighbors to achieve classroom integration or change program content. Parents will be needlessly required to sacrifice one or more educational values in the name of another.

To be sure, the nature and severity of certain disabilities makes such tradeoffs unavoidable in *some* cases. When the decision below, however, eliminates the need to accommodate children at the neighborhood school, it causes such tradeoffs unnecessarily. In addition, to the extent that a tradeoff must be made, the Tenth Circuit's decision will deprive parents of meaningful input into the outcome.

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disabilities from participation in the lives of their neighborhood schools, and sometimes even their communities." *Id.*

Placing parents at such a disadvantage in determining where their child attends school is contrary to the IDEA's emphasis on "the participation of the parents in developing the child's educational program and assessing its effectiveness." *School Comm. of Burlington v. Department of Educ. of Massachusetts*, 471 U.S. 359, 368 (1984). *Accord Board of Educ. v. Rowley*, 458 U.S. 176, 182 n.6 (1982) (Congress made an "effort to maximize parental involvement in the education of each handicapped child"); *Honig v. Doe*, 484 U.S. 305, 311 (1988) (Congress sought to "guarantee parents . . . an opportunity for meaningful input into all decisions affecting their child's education . . ."). Instead of the meaningful input into the education of their child contemplated by Congress, the parents' voice in determining the very school their child will attend is discounted and degraded by the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

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